

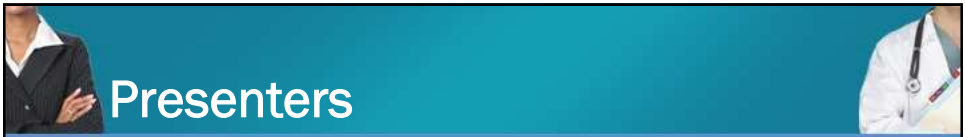


**EHR Technology: Where Meaningful Use, Compliance, and  
Clinical IT Intersect**  
**Wednesday, November 18, 2015**


**FOLEY**  
FOLEY & LARDNER LLP

1


©2015 Foley & Lardner LLP • Attorney Advertising • Prior results do not guarantee a similar outcome • Models used are not clients but may be representative of clients • 321 N. Clark Street, Suite 2800, Chicago, IL 60654 • 312.832.4500 12.9135




## Presenters




**Rick Rifembark**  
Partner  
Foley & Lardner LLP  
[rrifembark@foley.com](mailto:rrifembark@foley.com)



**Leeann Habte**  
Senior Counsel  
Foley & Lardner LLP  
[lhabe@foley.com](mailto:lhabe@foley.com)



**Ryan Haggerty**  
Senior Manager  
Deloitte & Touche LLP  
[rhaggerty@deloitte.com](mailto:rhaggerty@deloitte.com)



**Cathy Mechsner**  
Project Manager HIT  
L.A. Care Health Plan  
[CMechsner@lacare.org](mailto:CMechsner@lacare.org)

©2015 Foley & Lardner LLP 2 12.9135



## HITEC-LA

- Regional Extension Center – LA County based Eligible Providers
- Subsidized Technical Services:
  - ONC: Medicare/Medi-Cal Primary Care EPs thru Stage 1
  - CTAP: Medi-Cal EPs (Primary & Specialists) thru 2018+, all Stages of MU
- Over 5,000 Members, nearly 3,000 at meaningful use Stage 1

©2015 Foley & Lardner LLP

3

12.9.15



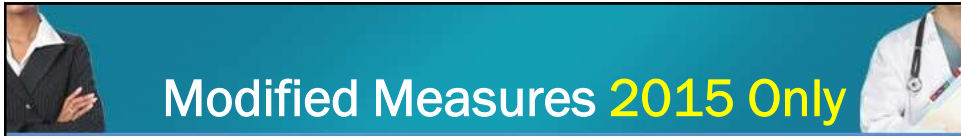
## Meaningful Use – Overview

- Modified Stage 2: Effective 12/15/2015
  - 2015 - 2017 Modifications
  - Stage 1 Exclusions/Alternatives 2015-16
  - Reporting period 90 days for 2015
  - No change to 2014 CQMs:
    - 9 (EP)/10 (EH) out of 64 measures
    - 3 out of 6 NQS domains
- Stage 3 2017 – 2018 & Beyond
  - CMS Comment Period Open until 12/14/15

©2015 Foley & Lardner LLP

4


12.9.15



## Modified Measures 2015 Only

Objectives	Stage 1 Thresholds	Public Health	Measure
CPOE (Med/Lab/Rad)	30%, Excl. for Lab/Rad	Immunization Data	Bi-directional interface
CDS w/Interaction Checking Enabled	1 CDS Rule	Syndromic Surveillance	Active Engagement
Patient Specific Education	Exclusion	Specialized Registry	Active Engagement
Medication Reconciliation	Exclusion	Reportable Labs (EH only)	Active Engagement
View/Download/Transmit	50% & Exclusion from 1 Patient/Portal		
Summary of Care/HIE	Exclusion		
Security	Annual Assessment	Stage in 2015	EH / EP
eRx w/Drug Formulary	40%-EP, Exclusion-EH	Stage 1	2 of 4    1 of 3
Secure Messaging (EP only)	Exclusion		


©2015 Foley & Lardner LLP 12.9.15



## Modified Measures - Registries

- Medicare – CMS NLR website open for 2015 MU attestations 1/4/2016 – 2/29/16
- Medi-Cal – CA State Level Registry (SLR) will close approximately 12/15/15 for Modified Stage 2 software upgrades.
- CA SLR will reopen for 2015 MU attestations Spring 2016 thru June 2016?

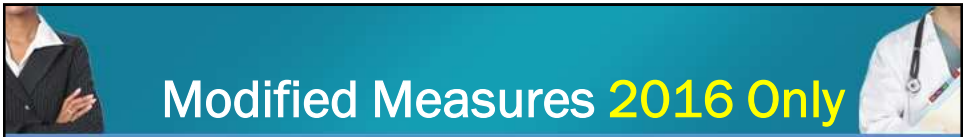
©2015 Foley & Lardner LLP 12.9.15



## Modified Measures - Registries

- CA SLR will remain open for 2015 AIU attestations while it upgrades the Registry for MU modifications.
- Medi-Cal – 2016 is the last year to start the meaningful use program and be eligible for the Federal Incentives.

©2015 Foley & Lardner LLP 12.9135



## Modified Measures **2016 Only**

Objectives	Stage 1 Thresholds	Public Health	Measure	
CPOE (Med/Lab/Rad)	30%, Excl. for Lab/Rad	Immunization Data	Bi-directional interface	
CDS w/Interaction Checking Enabled	5 CDS Rules	Syndromic Surveillance	Active Engagement	
Patient Specific Education	>10%	Specialized Registry	Active Engagement	
Medication Reconciliation	>50%	Reportable Labs (EH only)	Active Engagement	
View/Download/Transmit	50% & 1 Patient/Portal			
Summary of Care/HIE	Exclusion			
Security	Annual Assessment	<b>Stage in 2016</b>	<b>EH</b>	<b>EP</b>
eRx w/Drug Formulary	50%-EP, Exclusion-EH	Stage 1	3 of 4	2 of 3
Secure Messaging (EP only)	1 Patient			

©2015 Foley & Lardner LLP 12.9135

# Modified Measures 2015-2017

Objectives	Stage 2 Thresholds	Public Health	Measure
CPOE (Med/Lab/Rad)	>60%, >30%, >30%	Immunization Data	Bi-directional interface
CDS w/Interaction Checking Enabled	5 CDS Rules	Syndromic Surveillance	Active Engagement
Patient Specific Education	>10%	Specialized Registry	Active Engagement
Medication Reconciliation	>50%	Reportable Labs (EH only)	Active Engagement
View/Download/Transmit	50% & 1 Patient/Portal 2017>5% Patient/Portal		
Summary of Care/HIE	>10%		
Security	Annual Assessment	2015 - 2017	EH / EP
eRx w/Drug Formulary	50% - EP, >10% - EH	Stage 2	3 of 4    2 of 3
Secure Messaging (EP only)	2015 - Yes/No 2016 - 1 Patient 2017 - >5%		

# Stage 3 Overview

- Comments due to CMS by 12/15/15
- Stage 3 begins 1/1/17
- All users (EH/EP) must start Stage 3 by 1/1/18
- All users (EH/EP) must have 2015 CEHRT by 1/1/18
- EHR Incentive Program evolves into Alternate Payment Plans 2019 & beyond
  - MACRA & MIPS

# Stage 3 Objectives 2017-2018

Objectives	Stage 3	Public Health	Measure
CPOE (Med/Lab/Rad)	>60%, >60%, >60%	Immunization Data Bi-directional Interface	Active Engagement
CDS w/Interaction Checking Enabled	5 CDS Rules	Syndromic Surveillance	Active Engagement
Security	Annual Assessment	Electronic Case Reporting	Active Engagement
ePrescribe	60% - EP, >25% - EH	Public Health Registry	Active Engagement
<u>Electronic Access to Health Information</u> 1. V/D/T 2. Patient Specific Educ.	1. >80% Patient Portal, API/Both 2. >35%	Clinical Data Registry	Active Engagement
		Reportable Labs (EH only)	Active Engagement
		<b>2017 - 2018</b>	<b>EH / EP</b>
		Stage 3	4 of 6      2 of 5

# Stage 3 Objectives Cont'd

Objectives	Stage 3	2017 -2018
Health Information Exchange	1. Electronic Transition of Care 2. Incorporate Available Data 3. Medications, Problems, Medication Allergies Reconciliation	1. >50% 2. >40% 3. >80% 2 of 3
Coordination of Care Patient Engagement	1. Patient Engage - EHR 2. Secure Message 3. Patient Generated Info	<b>2017</b> 1. >5% (Pt Portal/ API) 2. >5% (EH & EP) 3. >5%
		<b>2018</b> 1. >10% (Pt Portal/ API) 2. >25% (EH & EP) 3. >5%



## What's Next in EHR Payment Programs?



- Medicare Payment Adjustments
  - Began in 2015
  - Eliminate the 90-day EHR reporting period for new meaningful EHR users beginning with the EHR reporting period in 2017, with a limited exception for Medicaid EPs demonstrating meaningful use for the first time.
  - Medicaid EPs and EHs have an EHR reporting period of any continuous 90-day period in the CY that is their PY, for their first PY of MU.



## Alternative Payment Methods



- Medicare Access and CHIP Reauthorization Act, Medicare Incentive Payment System
  - The Medicare EHR incentive program payment adjustments for EPs in 2018 will be the last of the penalties under the current program.
  - MIPS continues the EHR payment penalties but also extends the incentives for MU of CEHRT as a component of its framework for quality incentives.
  - Under MIPS, whether an EP is a Meaningful User of CEHRT is one of four performance categories used to calculate a composite score. The other performance categories are quality, resource use, and clinical practice improvement activities. Twenty-five percent (25%) of an EP's composite score is based on Meaningful Use of CEHRT.



## Alternative Payment Methods

- EPs who fall below or exceed the performance threshold for the composite scores will be assigned payment adjustment factors that begin at four percent (4%) in 2019 and increase to nine percent (9%) for 2022 and subsequent years.
- MIPS is budget neutral, as bonuses for EPs who score above the performance threshold will be funded by penalties imposed on EPs who fall below the threshold.
- The maximum calendar year payment adjustment factor for MIPS bonuses is equal to three times the payment adjustment factor for MIPS penalties for that same year.
- EPs who receive a significant portion of their revenue from alternative payment models (such as Accountable Care Organizations or through medical homes that meet certain criteria) would be exempt from MIPS and would receive enhanced payments from Medicare.



## MU – Directions for the Future

- MU Stage 3 – Ongoing Focus
  - Privacy and Security
    - HIPAA Security Risk Assessments
  - Exchange of health information
  - Patient access to EHR/patient portals
  - Secure messaging with patient
- MU Stage 3 – New Directions in Patient Engagement
  - Measure of % of Patients Connecting to EHR via applications of patient's choice
  - Measure of % of patients incorporating patient-generated data into EHR



A blue header banner with a businesswoman on the left and a doctor on the right. The text "HIT – Directions for the Future" is centered in white.

# HIT – Directions for the Future

## Health Information Technology Strategic Plan 2015 – 2020: Select Goals and Objectives

- Advance Secure and Interoperable Health Information
  - Enable individuals, providers, and public health entities to securely send, receive, find, and use electronic health information
  - Identify, prioritize, and advance technical standards to support secure and interoperable health information
  - Protect the privacy and security of health information
- Advance the Health and Well-Being of Individuals and Communities
  - Empower individual, family, and caregiver health management and engagement
- Advance Research, Scientific Knowledge, and Innovation
  - Increase access to and usability of high-quality electronic health information and services
  - Accelerate the development and commercialization of innovative technologies and solutions

©2015 Foley & Lardner LLP

12.9135

A blue header banner with a businesswoman on the left and a doctor on the right. The text "Privacy/Security Risks" is centered in white.

# Privacy/Security Risks

## Growing Risk of Data Breaches.

Healthcare sector accounted for 42.5% of breaches in 2014.

Criminal attacks increased by 125% in past 5 years.

Medical identity theft doubled in past 5 years.

Source: Ponemon Institute Fifth Annual Benchmark Study on Privacy and Security of Healthcare Data.

©2015 Foley & Lardner LLP

12.9135





## Privacy/Security Compliance

- Need for Ongoing Focus on Risk Assessment and Security Management Process.
- Coordination between HIPAA Privacy Officer and Security Officer.
- Evaluate Cyber-Liability Insurance Coverage and Indemnification by Vendors.
- Incident Response Plan.

©2015 Foley & Lardner LLP

12.9135

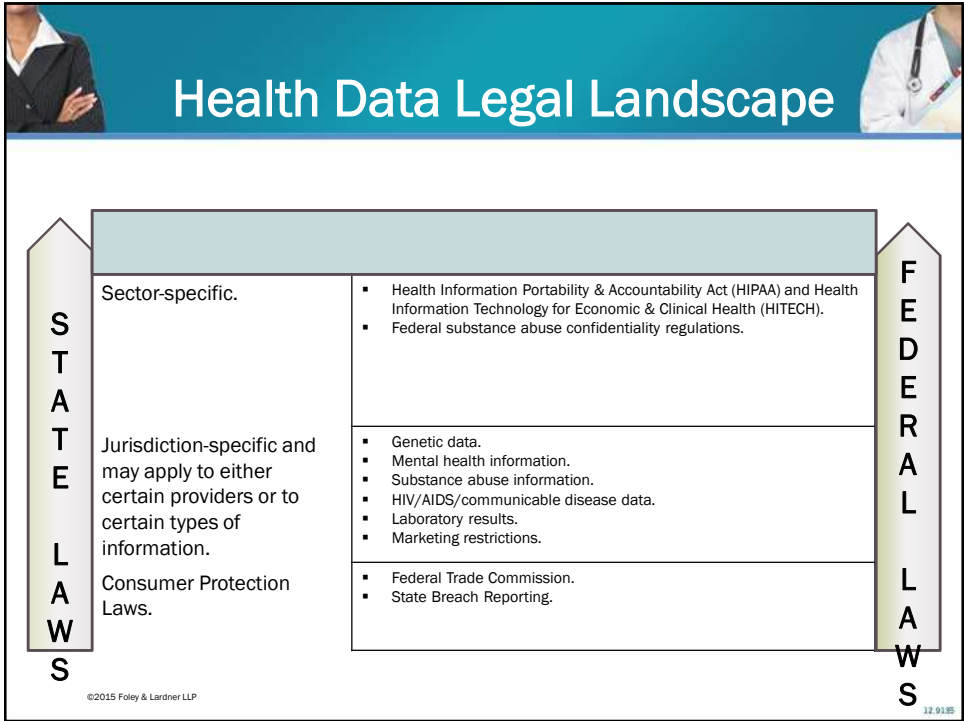


## Privacy Compliance Risks - HIE


- Trust Framework – Chain of Trust
  - Definition of permissible purposes for exchange
  - Common privacy/security standards
  - Consent management
  - Access management
  - Breach liability
- Contracting Issues
  - Data ownership
  - Secondary uses of data
  - Indemnification

©2015 Foley & Lardner LLP

12.9135



- ## Privacy Compliance Risks - HIE
- Implementation of Federal and State law Privacy laws that Restrict Disclosure of Sensitive Data through HIE -
    - HIV/AIDS
    - Substance Abuse
    - Mental Health
  
  - Restriction of Parental Access -
    - Health information about sensitive services to which minor can consent.
    - Information about “mature minors” and emancipated minors.
  
  - Data Segmentation Issues
    - DS4P standards for behavioral health information exchange.
- ©2015 Foley & Lardner LLP 12.9.15

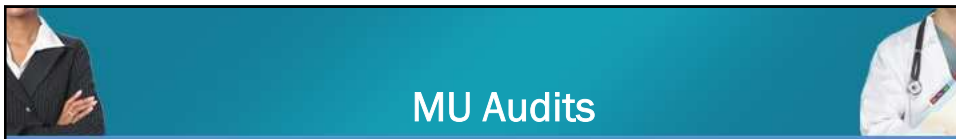


## EHRs & MU – Directions for the Future

- What are the existing and future challenges for privacy and security compliance?
  - Adequate internal security management process
    - Integration of Privacy/Security functions
  - Implementation of privacy restrictions in electronic environment
  - Address new security risks associated with digital health
    - Integration with consumer-focused applications

©2015 Foley & Lardner LLP

12.9135





## MU Audits

“We will review Medicare incentive payments to eligible health care professionals and hospitals for adopting EHRs and the Centers for Medicare & Medicaid Services (CMS) safeguards to prevent erroneous incentive payments. We will review Medicare incentive payment data from 2011 to identify payments to providers that should not have received incentive payments (e.g., those not meeting selected meaningful use criteria). We will also assess CMS’s plans to oversee incentive payments for the duration of the program and actions taken to remedy erroneous incentive payments.”

- OIG Fiscal Year 2015 Work Plan

©2015 Foley & Lardner LLP

12.9135





## MU Audits: Process

- CMS audit processes
  - Pre-payment edit checks
  - Pre-payment audits
  - Post-payment audits
- CMS pre and post payment audits
  - Conducted by Figliozzi and Company
  - Initial letter
  - Follow up requests
  - Potential on site review
- CMS reportedly intends to conduct pre- and post-payment audits on 5-10% of attestations
- OIG is auditing as well!

©2015 Foley & Lardner LLP

12.01.15



## MU Audits: Penalties

### Attestation Disclaimer

#### General Notice

NOTICE: Any person who knowingly files a statement of claim containing any misrepresentation or any false, incomplete or misleading information may be guilty of a criminal act punishable under law and may be subject to civil penalties.

#### Signature of Hospital Representative

I certify that the foregoing information is true, accurate, and complete. I understand that the Medicare EHR Incentive Program payment I requested will be paid from Federal funds, that by filing this attestation I am submitting a claim for Federal funds, and that the use of any false claims, statements, or documents, or the concealment of a material fact used to obtain a Medicare EHR Incentive Program payment, may be prosecuted under applicable Federal or State criminal laws and may also be subject to civil penalties.

©2015 Foley & Lardner LLP

12.01.15

## MU Audits: Penalties

- Recoupment
- Medicare payment penalties associated with failure to meet MU objectives
- Potential criminal/civil penalties



©2015 Foley & Lardner LLP



12.9.15

## MU Audits: Appeals

- Medicare appeal process set forth on CMS website
- Process consists of the submission of an appeal request form and relevant materials
  - Pay attention to MU appeal deadlines, which vary based on whether the submission is by an EP or Hospital
  - Information to be submitted depends on reason for MU appeal
- Certain issues are not appealable
  - Denial of hardship waiver request

©2015 Foley & Lardner LLP

12.9.15





## MU Audits: Compliance Measures

- Work with the person who will attest for your organization (e.g., practice manager, IT, finance dept. personnel)
- Maintain documentation relevant to MU attestation
  - Source documents
  - Documentation for non-percentage-based objectives
  - Other relevant documents (e.g., ONC EHR certification)
- Pay attention to document retention periods
  - 6 years for MU objectives and clinical quality measures
  - Payment calculation data (e.g., cost reports) should follow current documentation retention processes
  - States may require longer periods for Medicaid
- Conduct self audits
- Consider development of MU policies

©2015 Foley & Lardner LLP

12.9135




## Health Information Blocking

- ONC “Report on Health Information Blocking” (2015)
- Examples of health information blocking
  - Data lock in
  - Contractual provisions
  - High costs for interfaces
  - Non-standard technology
- ONC strategy to address health information blocking
  - Coordinate with CMS and OIG re AKS and Stark issues
  - Work with HHS to create payment incentives that reward interoperability
  - Several other approaches identified
- Legal risks and compliance measures

©2015 Foley & Lardner LLP

12.9135



## Evolving Use of the EHR

### Why should the Compliance Department care?

Electronic Health Record (EHR) adoption has increased rapidly in the United States through the EHR Incentive Program and Affordable Care Act.

With the increased use of EHRs, increased attention from regulators has followed.


The 2014 OIG work plan<sup>1</sup> stated that EHR fraud would remain a high priority through 2018.

The OIG's 2015 work plan<sup>2</sup> justification stated the need to “adopt oversight approaches that are suited to an increasingly sophisticated healthcare system and that are tailored to protect programs and patients from existing and new vulnerabilities.”

Sources:  
1. <http://oig.hhs.gov/reports-and-publications/archives/workplan/2014/Work-Plan-2014.pdf>  
2. <http://oig.hhs.gov/reports-and-publications/archives/workplan/2015/FY15-Work-Plan.pdf>

©2015 Foley & Lardner LLP

12.9135



## Benefits Associated with Proper Use of EHR Technology

- Proper use of electronic documentation can potentially provide a number of benefits as compared to paper-based documentation, including:
  - Improved legibility,
  - Real time accessibility,
  - Reduction of medical errors, and;
  - Decreased cost
  
- Benefits of properly utilized **documentation assist features** include improved efficiency of:
  - Data capture,
  - Timeliness,
  - Consistency, and;
  - Completeness

©2015 Foley & Lardner LLP

12.9135





## Risks Associated with Improper Use of EHR Technology



- Misuse of EHR technology functionality has the potential to result in or contribute to several challenges, with significant Regulatory, Financial and Legal implications .
- However, it is important to note that the risks of improper EHR use extend well beyond **Regulatory**, **Financial** and **Legal** risks, including but not limited to:
  - Quality of Patient Care
  - Patient Safety
  - Reputation
  - Patient Trust and Satisfaction,
  - Clinical Collaboration

©2015 Foley & Lardner LLP

12.9135



## Improper Use of EHR Technology – Common Risk Areas



- Risk Considerations related to the proper use of EHR technology and some of the common documentation assist features include but are not limited to:
  - Copy and Paste
  - Access / Authorship / Authentication
  - Documentation Templates
  - Amendments
  - Availability / Use of Audit Log Functionality
  - Patient Identification
  - Patient Portals

©2015 Foley & Lardner LLP

12.9135



## Risks Associated with Improper Use of EHR Technology



### Copy and Paste

- **These Copy and Paste Activities:**
  - Unique Information from a different patient's record
  - Documentation from another provider which includes their attestation statement
  - Identical verbiage used repeatedly for all patients seen by a provider for a specific timeframe with little or no modification regardless of the nature of the presenting problem or intensity of the service
- **May result in:**
  - Inaccurate or outdated information
  - Redundancy, which makes it difficult to identify the current information
  - Inability to identify the author or intent of documentation
  - Inability to identify when the documentation was first created
  - Propagation of false information
  - Internally inconsistent progress notes
  - Unnecessarily lengthy progress notes

©2015 Foley & Lardner LLP

12.9135



## Risks Associated with Improper Use of EHR Technology




### Access, Authorship and Authentication


- **Lack of Controls over Access, Authorship and Authentication such as:**
  - Proper role based restrictions related to authorization to perform certain actions
  - Ability to identify each individual's documentation contribution where multiple authors / contributors are involved at multiple points in the care delivery
- **May result in:**
  - Inability to demonstrate that certain activities in the clinical workflow were performed by appropriate / authorized individual
  - Inability to identify who was responsible for an act, event, condition, opinion, or diagnosis.
  - Inability to determine who made updates and edits to the health records

©2015 Foley & Lardner LLP

12.9135



## Risks Associated with Improper Use of EHR Technology




### Documentation Templates


- *Improper documentation template design and/or use, increases exposure to risk*
  - Reliance on documentation templates which have limited information entry and / or differential diagnosis choices
  - Misuse of “quick-links” to frequently used medications, diagnostic codes and recommended treatments, images, labs, etc.
  - Misuse of “Chart by exception” capability: some templates are customized to “auto-fill” with all clinical fields with common data at the start of the encounter - requiring the physician to deselect / change what is not applicable to the specific encounter
- *May result in:*
  - Incorrect or incomplete documentation of specific encounter details
  - Decrease in face to face, inquiry, examination and interaction based care encounters

©2015 Foley & Lardner LLP

12.9135



## Risks Associated with Improper Use of EHR Technology

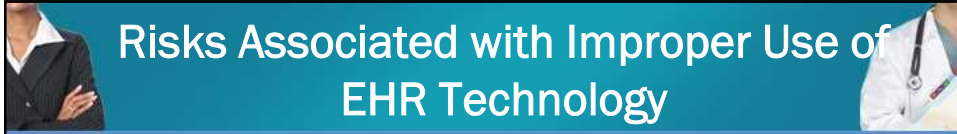


### Availability / Use of Audit Log Functionality

- *If the Audit Log functionality and reporting capabilities for your EHR are:*
  - *Unavailable;*
  - *Poorly designed;*
  - *Inconsistently or incorrectly used; or*
  - *Disabled, either permanently or temporarily*
- *The following limitations exist:*
  - *Inability to demonstrate that certain activities in the clinical workflow were performed by appropriate / authorized individual*
  - *Inability to identify who was responsible for an act, event, condition, opinion, or diagnosis.*
  - *Inability to determine who made updates and edits to the health records and when they are made*
  - *Inability to determine who viewed, extracted, or deleted a record and when the action occurred*

©2015 Foley & Lardner LLP

12.9135



## Risks Associated with Improper Use of EHR Technology

### Patient Portals

- *Key Compliance Considerations related to Patient Portals*
  - Accuracy
  - Completeness
  - Timeliness
  - Consistency
  - Managing Expectations of Key Stakeholders / Disclaimers
  - Patient Requests for Edits (Accuracy vs. Preference)
  - Documentation that is inappropriate or clinically unnecessary

©2015 Foley & Lardner LLP

12.91.15



## Mitigating Risks Associated with Improper Use of EHR Technology

Many hospitals have recommended audit and compliance functions but are not fully utilizing them to assess or mitigate risk related to the improper use of EHR technology

Risk mitigating considerations include but are not limited to:

- Policies and Procedures
- Education and Training
- Performing Independent and Departmental Auditing and Monitoring Activities
- Enabling the EHR Audit Log and Monitoring Capabilities
- Regulatory Environment Awareness
- Tone at the Top – Messaging and Consistency
- Key Stakeholder Collaboration (not just IT and Clinical Leadership)
- Peer Pressure to Collectively Own the Patient's Care
- Consistent, Open, Inclusive Dialogue and Healthy Debate

©2015 Foley & Lardner LLP

12.91.15